CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 233.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MUGG AND DRYDEN, A PARTNERSHIP COMPOSED OF J. A. MUGG AND J. A. DRYDEN.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED APRIL 19, 1905.

(19,717.)

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Judd & Detweiler (Inc.), Printers, Washington, D. C., December 16, 1905.

1 Caption Court of Civil Appeals.

Be it remembered that on this the first Monday in October 1904, it being the 3rd day of said month, there was begun and holden at the court house in the city of Fort Worth, in Tarrant county, Texas, a regular term of the honorable court of civil appeals in and for the second supreme judicial district of Texas: Present and presiding the Hon. T. H. Conner, chief justice, and Messrs. I. W. Stephens and Ocie Speer, associate justices, W. C. Strong, clerk of said court and Dan Parker bailiff of said court, at which term the following orders and decrees were made and entered of record, to wit:—

1a *Caption.*

THE STATE OF TEXAS, *County of Tarrant:*

At a term of the county court, begun and holden in and for Tarrant county, Texas, on the 2nd day of November A. D. 1903, and which adjourned on the 2nd day of January A. D. 1904, before the Honorable R. F. Milam, judge thereof, the following cause came on to be heard, to-wit:

No. 8287.

MUGG & DRYDEN
vs.
TEXAS & PACIFIC RY. CO.

Statement of Pl'ff's Cause of Action.

In the Court of Tarrant County, Texas.

MUGG & DRYDEN
vs.
TEXAS & PACIFIC RY. CO.

Statement of Plaintiff's Cause of Action.

Damages in the sum of $140.18 as follows:—

By reason of defendant making and quoting to plaintiffs a rate of $1.25 per ton on two cars of coal and $1.50 per ton on one car of coal, in January and February 1903 respectively, from Coal Hill, Ark., to Weatherford, Texas, on which rates so made and quoted *to* plaintiff relied in contracting said coal shipped and sold at prices based on said rates; whereas defendant assessed and collected of plaintiff freight at the rate of $2.75 per ton, on said two cars and

$2.85 per ton on said one car, which said freight rate plaintiff was forced to pay and did pay under protest in order to obtain said coal and deliver same in compliance with sales previously made.

That plaintiff's loss and damage in the sum aforesaid were occasioned by defendant's negligence in making and quoting to plaintiff the said rates on which rate quoted, defendant knew plaintiff relied and based their sales of the said three cars of coal shipped and sold thereafter and then forcing plaintiffs to pay a greater rate amounting in the aggregate to the sum of $140.18, on said
2 three cars of coal, thereby causing plaintiffs' loss and damage in the said sum.

Def't's Answer Orally.

In the County Court of Tarrant County, Texas.

No. 8227.

MUGG & DRYDEN
vs.
TEXAS & PACIFIC RY. CO.

Defendants answers plaintiff's cause of action in the above styled and numbered cause, orally as follows:

The defendant answers by general demurrer and general denial and especially denies that it ever entered into any contract for the shipment of coal for plaintiff from Coal Hill, Arkansas, to Weatherford, Texas, at the rate alleged viz. $1.25 per ton. It further answers that if it ever quoted any rate of $1.25 per ton to plaintiff, which is not admitted but specially denied, that such quotation was a violation of the Interstate Commerce act, and was a lower rate than the Interstate rate in effect at the time the shipment was made, which was duly published, printed and posted in the depots and stations of this defendant, as required by the Interstate Commerce act; and further, that it collected from plaintiff said Interstate Commerce rate applying on coal in car load lots from Coal Hill, Arkansas, to Weatherford, Texas, the said rate being $2.75 per ton during the month of January, 1903, and $2.85 per ton during the month of February 1903. Defendant further says, while plaintiff alleges that he is suing for damages by reason of said quotation, that it is in effect and is in fact a suit for overcharge and not for damages, and that it was required under the law to collect the regular published and printed rate of $2.75 and $2.85 per ton, which said rate was posted in defendant's stations and depots; and that if such contract was entered into, it was in violation of the law and plaintiff could not recover.

3 *Judgment.*

No. 8287.

MUGG & DRYDEN
vs.
T. & P. RY. CO.

Judgment.

DEC. 28TH, 1903.

This day came the parties in the above styled and numbered cause by their respective attorneys of record then came on to be heard said cause, a jury being waived the matters of fact as well as of law having been presented to the court and the court having heard the same, it is the opinion of the court that defendant Texas & Pacific Ry. Co. is justly indebted to the plaintiffs in the sum of one hundred forty and 18-100 dollars ($140.18)

It is therefore considered adjudged and decreed by the court that the plaintiffs Mugg & Dryden do have and recover of and from the defendant The T. & P. Ry. Co., the sum of one hundred and forty and 18-100 dollars, and all costs by reason of this suit together with interest thereon from this date at the rate of six per cent. per annum, for all of which let execution issue.

Motion for New Trial.

In the County Court of Tarrant County, Texas.

No. 8287.

MUGG & DRYDEN
vs.
T. & P. RY. CO.

Now comes the defendant The Texas & Pacific Railway Company, and moves the court to set aside the judgment herein rendered and grant it a new trial, for the following reasons:

1. The court erred in not holding as a matter of law, that the contract or quotation of rate on which this suit was founded, was void, being in violation of the law, and that no action could arise therefrom.

2. The court erred in not holding that any quotation at a less rate than the Interstate Commerce rate was void and could not be enforced.

4 STANLEY, SPOONTS & THOMPSON,
Attorneys for Defendant.

Endorsements: No. — Mugg & Dryden *vs.* T. & P. Ry. Co. In the county court of Tarrant county, Texas. Motion for new trial. Filed Dec. 30, 1903. R. L. Rogers, county clerk.

Order Overruling Motion for New Trial.

No. 8287.

MUGG & DRYDEN
vs.
TEXAS & PACIFIC RY. CO.

Def't's Mo. for New Trial.

JANUARY 2, 1904.

This day came the respective parties in the above styled and numbered cause by their respective attorneys of record, then came on to be heard defendant's motion for new trial herein, and the court having heard the same and being fully advised in the premises—

It is ordered by the court that said motion be and the same is hereby overruled to which ruling defendant excepts and in open court gave notice of appeal to the court of civil appeals for the second supreme judicial district of Texas.

Further ordered by the court that defendants have twenty days after adjournment of court within which to prepare and file statement of facts.

Statement of Facts.

In the County Court of Tarrant County, Texas.

No. 8287.

MUGG & DRYDEN
vs.
T. & P. RY. Co.

Be it remembered that on the trial of the above case, the following facts were proved.

J. A. MUGG, of the firm of Mugg & Dryden, plaintiffs, testified as follows:—

I am a member of the firm of Mugg & Dryden, plaintiffs engaged in feed, fuel and ice business in Fort Worth, Texas.

5 About January 10th 1903, I went to Capt. Clements, commercial agent for the defendant Co., at Fort Worth Texas, and inquired of him the rate on slack coal from Coal Hill Ark. to Weatherford Texas; he told me Weatherford was a common point

and took the same rate as Fort Worth, and told me the rate was $1.25 per ton, with a reconsignment charge of $2.00 per car if car is forwarded from Fort Worth. That this rate applied to Weatherford Texas, from Coal Hill Ark. on the grade of coal named, slack coal.

Before I had the billing changed and these cars forwarded I went back to Capt. Clements to again ask him the rate as I was selling the coal to Weatherford based on the rate he named, the freight charge governing me in the price I quoted; when I went to him, the second time I asked him to look up the rate in the published tariffs and he told me how many years he had been in the business and that the rate to Weatherford was $1.25 per ton on that coal from Coal Hill, Ark.

I sold three cars of coal in Weatherford, two based on the $1.25 per ton rate, in January and one based on $1.50 per ton rate in February, having been advised that the rate was raised to $1.50 per ton in February.

Coal was sold to city of Weatherford Water, Light and Ice Co., which was to pay the shipping charges, the shipments being billed to our order at Weatherford. This Company paid the freight at our instructions and charged the amounts so paid against us. On the two cars shipped in January the charge was made and collected, being paid under protest, at $2.75 per ton, and on the car shipped in February the charge was made, and collected, being paid under protest, at $2.85 per ton.

I made other shipments to Weatherford during January from Coal Hill Ark., same grade of coal; two cars were sold and delivered to Planters Oil Co. there, and the freight charged and collected was $1.25 per ton. Three other cars than those involved in this
6 suit, same grade coal, same origin, Coal Hill Ark. were sold by my firm to Water, Light and Ice Co., at Weatherford in January 1903, and the rate charged and collected on each of said cars was $1.25 per ton. All five of these cars were delivered by and rate made and freight collected by defendant R. R. Co. The three cars in question were the only ones in which a higher rate was collected than that which had been quoted by the agent of defendant Co., to whom I went to get the rates before contracting for sale of said coal and fixing price, on which rate was so made to me, I relied in making the contract for sale of the coal. The difference between the rate charged and that collected, which was our loss, was as follows:—

On car I. M. 4856	$47.02
On car M. P. 24322	44.19
On car M. P. 13856	48.97
	$140.18

Plaintiffs sold the said three cars of coal to the city of Weatherford, Water, Light and Ice Co., f. o. b. Weatherford, at $2.30 per ton, considerable less than the freight rate collected on said three cars.

C. C. LITTLETON, testified by deposition as follows:

My name is C. C. Littleton. I reside at Weatherford, Parker county, Texas. I am general manager for the Planters' Oil Company and have occupied that position for three years. I have control of the purchase of the fuel for said company, and I make payments for the same. Yes, my company bought several cars of coal from plaintiffs during the months of January and February 1903. Plaintiffs shipped two cars to my company named and numbered as follows: M. P. 9763 and M. P. 14085. They were billed from Coal Hill Arkansas. I do not know the date of shipment. I paid freight on them on February 11th, 1903, on which date I think they were delivered to me. The weight, according to freight expense bills, was 44000 pounds and 64000 pounds, respectively. These cars were delivered to me by the Texas & Pacific
Railway Company at Weatherford, Texas, and the freight
7 was collected by said railway company at the rate of $1.25
per ton. Payment was made to W. W. Myers, local agent here of the said railway company. My recollection is that when I paid the freight on these two cars of coal, the bill clerk in the railway office made out the expense bills hereto attached and charged the rate as is given above, and afterwards the agent claimed to me that they had made an undercharge on said cars, and that they would have to collect more freight. These expense bills show the exact amount of freight paid by me. These bills are hereto attached and marked A and B for identification, and made a part of this my answer. The two cars in question were the last cars purchased by me. I have not bought any coal that came from Coal Hill Arkansas since the shipment of these two cars and I do not know the freight rate from that point now. The rate first charged and paid was as is shown by the bills hereto attached. I know from personal experience that mistakes are often made by the railway clerks. During some of these conversations the railway agent told me that there had been a recent raise in freight rates. I was not interested in what the freight rate was as I bought the coal at a delivered price.

A. P. BOVIER testified by deposition as follows:

My name is A. P. Bovier. I reside at Weatherford, Parker county, Texas. I am manager of the city of Weatherford Water, Light and Ice Company, and I held such position during the months of January and February, 1903, and until May 1st, 1903. I have, and during said time did have, access to and control over the buying of coal and fuel, contracting and paying for same when received. My said company did buy some coal from plaintiffs during the months of January 1903, and I paid the freight charges on same to the agent at Weatherford, Texas, upon the delivery of said coal. During the months of January and February, 1903, I bought
from the plaintiffs six cars of coal to be shipped from Coal
8 Hill, Arkansas; that is, the bills of lading sent to me show
shipment from said place. Said coal was delivered to me at

Weatherford Texas, by the Texas & Pacific Railway Company. Yes, cars of such description and number with coal were delivered to me and was a part of said coal bought by me from plaintiffs. Said car No. 24462 was shipped about January 12th, 1903, amount of coal 64600 pounds, amount of freight paid by me rate $1.25 per ton, amount paid $42.37, delivered to me January 12th, 1903.

Said car No. 24024 was shipped about January 19th, 1903, was delivered to me on said date, amount of coal in same was 65700 pounds, freight rate charged $1.25 per ton, amount of freight charged 41.06, and $2.00 for R. C. charges making a total of 43.06. Said car No. 13804 was shipped on February 2nd 1903, and was delivered to me on said date, amount of coal in said car was 5300 pounds, freight rate charged on same was $1.25 per ton, and amount of freight paid by me was $40.81, and R. C. charges 2.00, making a total of $42.61 paid by me on said car. Receipts of said payments are hereto attached, marked A. B. and C for identification, and made a part of this answer. The defendant company charged and collected said freight. Yes, cars of such numbers and description filled with coal were delivered to me, purporting to have been shipped to me by plaintiffs from Coal Hill, Arkansas. Said car No. 4856 was delivered to me February 21st 1903, weight 2700 pounds, freight rate charged $2.75 per ton, amount of freight paid on same $86.21 and $2.00 for R. C. charges, making total of $88.21 paid by me under protest. Said car No. 24322 was delivered to me on February 17th 1903, weight 65500 pounds, freight rate charged $2.85 per ton, amount of freight paid by me was 93.32, R. C. charges $2.00, making a total of $95.32 paid by me under protest. Said car No. 13856 was delivered to me on February 7th, 1903, weight of same 65300 pounds, freight rate charges $2.75 per ton, amount of freight paid by me $89.79, and R. C. charges $2.00, making a total of freight paid by me $91.79 paid by me under protest. Said coal was delivered to me and said freight collected by the defendant company at Weatherford, Texas. I do not know the date of such shipments. The receipts of such shipments are marked D E and F for identification hereto attached and made a part of my answer.

The total cost of each car was the weight of each car as given above at said price of $2.30 per ton. It was contracted to me at $2.30 per ton by plaintiffs. This price was f. o. b. at Weatherford, Texas. I was not to pay any freight charges, and of course, I deducted the freight and R. C. charges from the amount I owed plaintiffs for the coal at $2.30, and remitted to them the balance, where the freight charges paid by me were less than the price of the coal; and in the three cars where the freight charges paid by me exceeded the price of the coal as given above, plaintiffs paid *be* the difference. Yes, after I had paid for the first three cars above described, such agent did claim to me that such rate of $1.25 per ton was an error, and insisted upon my paying a greater rate, but I refused to pay any more. It is true that on subsequent shipments of the three cars

described above, as I stated in my answer to direct interrogatories. I am not now paying freight on shipments from Coal Hill, Arkansas, to Weatherford, Texas; have made no such shipments since the last one above described. I knew nothing about the freight rate agreed upon. I knew nothing about whether any change was made in the freight rate, except what I saw on the freight bills, attached to my answers to direct interrogatories, and from what was explained to me by the agent. The agent tried to get me to draw on plaintiffs for what he claimed to be the difference between the freight collected on the first three cars and what should have been collected according to his contention, but I refused to do so. In my conversation with said agent, he explained to me that there had been an increase of freight rates between said points in February of ten cents over rates in January.

10 It was agreed between the counsel for plaintiffs and the counsel for defendants before announcing ready for trial, that the rate charged and collected on the shipments of coal in controversy, from Coal Hill, Arkansas to Weatherford, Texas, viz. $2.75 per ton on each of the two cars, and $2.85 per ton on the third car, was the regular rate in effect at the time the shipments were made, as shown by the printed and published schedules of the Texas & Pacific Railway Company on file with the Interstate Commerce Commission and posted in the stations of the Texas & Pacific Railway Company, as required by the interstate commerce act.

W. B. PADDOCK, *Att'y for Plaintiff.*
STANLEY, SPOONTS & THOMPSON,
Att'ys for Def't.

Approved 1-18-'04.
R. F. MILAM, *County Judge.*

Endorsements: No. 8287. Mugg & Dryden vs. T. & P. Ry. Co. In the county court of Tarrant county, Texas. Statement of facts. Filed January 18, 1904. R. L. Rogers, county clerk.

Appeal Bond.

In the County Court of Tarrant County, Texas.

No. 8287.

MUGG & DRYDEN
vs.
TEXAS & PACIFIC RY. CO.

Whereas, in the above numbered and entitled cause pending in the county court of Tarrant county, Texas, and at a regular term of said court, to-wit: on the 2nd day of January 1904, the plaintiffs in the above cause Mugg & Dryden a firm composed of J. A. Mugg and

J. A. Dryden recovered a final judgment against The Texas & Pacific Railway Company, the defendants in said cause, for the sum of one hundred forty and 18/100 dollars, with interest thereon from date of said judgment at 6 per cent. per annum and all costs of
11 suit, from which judgment the said defendant The Texas & Pacific Railway Company has taken an appeal to the court of civil appeals of the State of Texas, and desires to suspend the execution of said judgment during the pendency of its said appeal;

Now, therefore, we, the Texas & Pacific Railway Company as principal, and the undersigned as sureties, acknowledge ourselves bound to pay to Mugg & Dryden a firm composed of J. A. Mugg & J. A. Dryden plaintiff in the above cause, the sum of three hundred and fifty and no 100 (#350.00) dollars, conditioned that the said The Texas & Pacific Railway Company shall prosecute its appeal with effect, and in case the judgment of the supreme court or court of civil appeals shall be against it, the said The Texas & Pacific Railway Company, that it shall perform the judgment, sentence or decree of the said court, and pay all such damages as said court may award against it the said The Texas & Pacific Railway Company.

Witness our hands this the 18th day of January 1904.

THE TEXAS & PACIFIC RAILWAY CO.,
By STANLEY, SPOONTS & THOMPSON, *Attys.*
EDW. O. TENNISON.
Z. J. HOLLAND.

Approved and filed Jan. 21, 1904.
R. L. ROGERS, *County Clerk.*

Endorsements: No. 8287. County court, Tarrant county. Mugg & Dryden *vs.* The Texas & Pacific Railway Company. Appeal bond. Filed Jan. 21, 1904. R. L. Rogers, clerk county court, Tarrant county, Texas.

Assignment of Errors.

In the County Court of Tarrant County, Texas.

No. 8287.

MUGG & DRYDEN
vs.
T. & P. RY. CO.

Now comes the defendant, Texas & Pacific Railway Com-
12 pany, and assigns the following errors committed by the court on the trial hereof.

I.

The court erred in rendering judgment for the plaintiff in this cause, because the undisputed evidence shows that the rate alleged to

have been quoted to plaintiff by the defendants' agent was a lower rate than the rate filed with the Interstate Commerce Commission, covering coal in car load lots from Coal Hill, Arkansas to Weatherford, Texas, and printed and publicly posted in the defendant's stations and in effect at the time this shipment was made, and such contract or quotation was therefore in violation of law and void, and that by reason thereof plaintiff could not recover herein.

II.

The court erred in rendering judgment herein for the plaintiff, because the undisputed evidence shows that the plaintiff's cause of action is based on the quotation of a rate alleged to be a contract of shipment lower than the rate in effect on shipments of coal in car load lots from Coal Hill, Arkansas to Weatherford, Texas, filed with the Interstate Commerce Commission and printed and publicly posted; which contract or quotation of rate was illegal and void, and no recovery can be had for a br-ach thereof.

III.

The court erred in rendering judgment for the plaintiff, for the reason that no recovery can be had for the breach of an illegal contract.

IV.

The judgment of the court is contrary to the law and the evidence.

STANLEY, SPOONTS & THOMPSON,
Attorneys for Defendant.

13 Endorsement: No. 8287 Mugg & Dryden *vs.* T. & P. Ry. Co. In the county court of Tarrant county, Texas. Assignments of error. Filed Mar. 24, 1904. R. L. Rogers, county clerk.

Bill of Costs in County Court.

No. 8287.

MUGG & DRYDEN
vs.
TEXAS & PACIFIC RAILWAY CO.

Clerks fees.

Filing and docketing	.15
Filing papers	.45
Entering appearances	.10
Motions	.10
Entering orders	1.50
Swearing witnesses	.40

nal judgment	.50
axing costs	.25
iling and approving bond	1.05
anscript	10.00
heriff jury fee	.50
ary fee	3.00
dge's fee	3.00
. J. costs	4.15
Total costs	$25.20

In County Court, Tarrant County.

THE STATE OF TEXAS, *Tarrant County.*

I, R. L. Rogers, clerk of the county court in and for said county nd State, hereby certify the above to be a correct account of the costs n the above entitled numbered suit up to this date.

Witness my hand and the seal of said court, affixed at office in the ity of Fort Worth, this the 31st day of March, 1904.

R. L. ROGERS,

[SEAL.] *Clerk County Court, Tarrant County, Texas.*

By A. J. BEAVERS, *Deputy.*

14 *Certificate of County Clerk.*

THE STATE OF TEXAS, *County of Tarrant:*

I, R. L. Rogers, clerk of the county court, in and for said county and State aforesaid, do hereby certify that the above and foregoing pages contain a true and correct copy of all the proceedings had in this court, in cause No. 8287 Mugg & Dryden *vs.* Texas & Pacific Railway Co.

Witness my hand and official signature, at office, in the city of Fort Worth, Texas, this 31st day of March, A. D. 1904.

[SEAL.] R. L. ROGERS,

Clerk County Court, Tarrant County, Texas.

By A. J. BEAVERS, *Deputy.*

Order of Submission.

OCTOBER 8, 1904.

It is ordered by the court that the following cases be set down for submission on the 22 day of October, 1904.

4556—T. & P. Ry. Co *vs.* Mugg & Dryden, from Tarrant county.

Order of Submission.

OCTOBER 22 1904.

The following cases were this day submitted:
4556—T. & P. Ry. Co. vs. Mugg & Dryden, from Tarran, county.

Order to Certify.

4556.

TEXAS & PACIFIC RY. CO.
vs.
MUGG & DRYDEN.

NOVEMBER 19, 1905.

It is ordered that the questions shown in the certificate be certified to the supreme court for determination.

Answer of Supreme Court of Texas to Certified Questions

No. 1373.

TEXAS & PACIFIC RAILWAY COMPANY, Appellant
vs.
MUGG & DRYDEN, Appellees.

From Tarrant County, Second District.

Certified question from the court of civil appeals of the second supreme judicial district as follows:

"We deem it advisable to certify to your honors for decision the question, whether or not the appellant, Texas & Pacific Railway Company, is liable to the appellees, Mugg & Dryden, upon
15 the following state of facts, said cause being now before us for determination upon appeal from the county court of Tarrant county, Texas. The cause originated in the justice court, from which it was appealed to the county court of Tarrant county, where a trial was had on the following statement of appellees' cause of action, to-wit: 'Statement of plaintiffs' cause of action. Damages in the sum of $140.18 as follows: By reason of defendant making and quoting to plaintiffs a rate of $1.25 per ton on two cars of coal and $1.50 per ton on one car of coal, in January and February 1903 respectively, from Coal Hill, Ark., to Weatherford, Texas, on which rates so made and quoted to plaintiff relied in contracting said coal shipped and sold at prices based on said rates; whereas defendant assessed and collected of plaintiff freight at the rate of $2.75 per ton,

on said two cars and $2.85 per ton on said one car, which said freight rate plaintiff was forced to pay and did pay under protest in order to obtain said coal and deliver same in compliance with sales previously made. That plaintiffs' loss and damage in the sum aforesaid were occasioned, by defendant's negligence in making and quoting to plaintiff the said rates on which rate quoted, defendant knew plaintiff relied and based their sales of the said three cars of coal shipped and sold thereafter and then forcing plaintiffs to pay a greater rate amounting in the aggregate to the sum of $140.18, on said three cars of coal, thereby causing plaintiffs loss and damage in the said sum."

"To this pleading the appellant answered by general demurrer and general denial, and especially denied that it ever entered into any contract for the shipment of coal for appellees from Coal Hill, Arkansas, to Weatherford, Texas, at the rate alleged in appellees' statement; and further that if it ever quoted any such rate to appellees such quotation was a violation of the Interstate Commerce Act

and was a lower rate than the interstate rate in effect at the
16 time shipment was made which had been duly published, printed and posted in its depot and stations as required by the terms of the act; and further that it collected from appellees the exact rate prescribed for such commodity under such act, and that such contract, if any was made, was in violation of law and void. Upon a trial without a jury judgment was rendered for the appellees for the amount sued for and all costs of suit.

"It is agreed by the parties that the rate charged and collected on the shipments of coal in controversy from Coal Hill, Arkansas, to Weatherford, Texas, as shown in appellees' statement of cause of action, was the regular rate in effect at the time the shipments were made, as shown by the printed and published schedules of the Texas & Pacific Railway Company on file with the Interstate Commerce Commission, and posted in the stations of said railway company, as required by the Interstate Commerce act. There is no assignment challenging the sufficiency of the evidence to support the material allegations of appellees' pleadings."

We answer that the railroad company is liable to the appellees for damages occasioned by the misrepresentation of the rate of freight as shown by the statement of facts.

The authority of the agent, who stated the rate to the appellees, is not questioned. The fact that the agent named a rate less than that which was in effect at the time and which was posted according to the Interstate Commerce law will not avoid the claim of the appellees for damages arising out of the misrepresentation of the appellant's station agent. It is true that if the agent had made a contract with the appellees for the shipment of the coal from Coal Hill, Arkansas, to Weatherford, Texas, at the rate stated by him, that contract could not have been enforced, because it would have been in violation of the Interstate Commerce law. But this suit was not

brought upon such contract for its enforcement; there was
17 no contract; it is an action for damages occasioned to the appellees by the misrepresentation of the agent of the railroad company, whereby appellees were caused to make a contract for the sale of coal at a certain price, relying upon the representation by appellant's agent that the freight rate would be as stated, whereas the appellees were compelled to pay a higher rate and thus the damages arising to the appellee were occasioned by the misstatement which induced them to make the investment in the coal and the contract for its sale. (Pond-Decker Lumber Co. *v.* Spencer, 86 Fed. Rep., 846; Missouri Pacific Ry. Co. *v.* Crowell Lumber Co., 70 N. W., 964.)

The two cases cited are very similar in their facts to this. In Pond-Decker Lumber Co. *v.* Spencer, the identical question here presented was raised and decided in accordance with our opinion, although there are some facts in the case which would distinguish it from this upon other points and the case might have been decided possibly without deciding the question involved here, yet the question was involved in that case and was decided by the court; it is therefore authority for the answer that we have made. The second case cited above determines the question of the right of a shipper to recover damages accruing by reason of the misrepresentation of a freight rate and was based upon facts very similar to those certified in this case.

T. J. BROWN,
Associate Justice.

Opinion delivered December 15, 1904.

CLERK'S OFFICE, SUPREME COURT.

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the foregoing three pages contain a true and correct copy of the opinion in cause No. 1373, Texas & Pacific Railway Company, appellant, *versus* Mugg & Dryden, appellees. Certified question from the second district.

18 Witness my hand and the seal of said court this the 31st day of December, A. D. 1904.

[SEAL.] F. T. CONNERLY, *Clerk*,
By J. S. MYRICK, *Deputy*.

December 15th, 1904.

Certified Questions from Second District.

No. 1373.

TEXAS & PACIFIC RY. CO.
vs.
MUGG & DRYDEN.

Opinion delivered by Associate Justice BROWN:

"It is ordered by the court that a copy of the opinion herein delivered be certified to the court of civil appeals for the second supreme judicial district, and that the said cause be therein proceeded with in accordance with said opinion."

I, F. T. Connerly, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the order made by the supreme court in the above styled and numbered cause.

Witness my hand and the seal of said court this the 31st day of December A. D. 1904.

[SEAL.]

F. T. CONNERLY, *Clerk.*
By J. S. MYRICK, *Deputy.*

Filed in court of civil appeals for second supreme judicial district of Texas Jan. 2, 1905.

W. C. STRONG, *Clerk.*

Bill of Costs in Sup. Ct of Texas.

No. 1373.

Certified Copy Bill of Costs in Supreme Court.

TEXAS & PACIFIC RY. CO.
vs.
MUGG & DRYDEN.

Tarrant Co.

Clerk's Office, Supreme Court.

	Filing record	.50
	Docketing cause	.50
	Entering appearances	1.00
	Filing briefs and arguments	.60
	Filing extra papers	.60
19	Entering judgment	1.00
	Taxing costs	.50
	Certified copy of bill of costs	1.00

Recording opinion	1.50
Certified copy of opinion	1.50
Entering orders	1.00
Notices to counsel	2.00
Cert. copy of judgment to C. C. A.	1.00
Total	$12.70

Judgment of Court of Civil Appeals.

4556.

TEXAS & PACIFIC RY. CO.
vs.
MUGG & DRYDEN.

From County Court of Tarrant County.

JANUARY 7, 1905.

Opinion by Mr. Speer, A. J., orally.

This cause came on to be heard on the transcript of the record and the same being inspected because it is the opinion of the court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed, in accordance with the opinion of the supreme court of Texas on the certified questions in this cause; that the appellees, Mugg & Dryden, a firm composed of J. A. Mugg and J. A. Dryden, do have and recover of and from the appellant, Texas & Pacific Railway Company and its sureties, Edw. O. Tenison and Z. J. Holland, the amount adjudged below, together with all costs in this behalf expended, and this decision be certified below for observance.

Motion by the Appellant for Rehearing.

In the Court of Civil Appeals for the Second Supreme Judicial District, at Fort Worth, Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY, Appellant,
vs.
MUGG & DRYDEN, Appellees.

Appeal from the County Court, Tarrant County, Texas.

Now comes the appellant in the above styled and numbered cause and moves the court to set aside the judgment heretofore ren-
20 dered in this cause, to affirm the judgment of the court below,—the county court of Tarrant county, Texas,—and

to grant a rehearing and reverse the judgment of the court below for the following reasons to-wit:—

I.

Because the court erred in refusing to sustain the first assignment of error presented to it by appellant in its brief, heretofore filed, and in not holding that the quotation of a rate lower than that on file with the Interstate Commerce Commission, and that the rate so quoted was illegal and invalid, and in contravention of the terms of the inter-state commerce act, and acts amendatory thereto, and for this reason no recovery should be had in an action of this character.

II.

The court erred in refusing to sustain the second assignment of error presented by appellant, and in allowing a recovery by appellee for damages caused and occasioned by an erroneous quotation to appellee of the rate in question, which said rate so quoted was a lower rate than the Inter-state Commerce rate, because said action is in effect an action for overcharge, for which there can be no recovery.

III.

The court erred in not sustaining appellant's third assignment of error, and in holding that a recovery in this case was not in violation of the terms of those acts commonly called the Inter-state Commerce acts, and acts amendatory thereto—the effect of the court's holding being to allow appellant to grant, and appellee to accept, a rebate or concession, and making appellant guilty of discrimination under the meaning of such acts.

IV.

The court erred in not sustaining appellant's fourth assignment of error, and in not holding that the judgment of the lower court was contrary to the law and evidence.

21 V.

The court erred in not holding that the judgment of the lower court and of this court is repugnant to and in conflict with the laws of the United States, and especially repugnant to and in conflict with those several acts of Congress commonly known as the Inter-State Commerce acts, and the acts amendatory thereto, including the Elkins bill, and denies to appellant the rights and immunities conferred upon it by said acts.

VI.

The court erred in affirming the judgment of the lower court, and in its interpretation placed upon the Inter-State Commerce act, which is in violation of and in contravention of said act.

VII.

Appellant represents that Robert Harrison and W. B. Paddock who reside in Tarrant county, Texas, are the attorneys of record for the appellee.

Wherefore, appellant prays that notice according to law be given of this application, and that on the hearing hereof the judgment affirming the cause heretofore rendered herein be set aside, and a rehearing granted, and that further proceedings be had herein as prayed for in appellant's original brief.

SPOONTS & THOMPSON,
MARSHALL SPOONTS,
Attorneys for Appellants.

Filed in the court of civil appeals for second supreme judicial district of Texas, Jan. 21, 1905.

W. C. STRONG, *Clerk.*

Order Overruling Motion for Rehearing.

4397-4556.

TEXAS & PACIFIC RY. CO.
vs.
MUGG & DRYDEN.

FEBRUARY 11, 1905.

This day came on to be heard the motion by the appellant for rehearing in this cause, and the same having been duly con-
22 sidered by the court, is overruled.

Application for Writ of Error to U. S. Sup. Court.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RY. CO., Plaintiff in Error,
vs.
MUGG & DRYDEN, Defendant in Error.

To the Honorable T. H. Conner, chief justice of the court of civil appeals for the second supreme judicial district of the State of Texas.

The petitioner, The Texas & Pacific Railway Company, respectfully shows that heretofore, to-wit: upon the 28th day of December, A. D. 1903, there was tried in the county court of Tarrant county,

Texas, in the city of Fort Worth, county of Tarrant, of the State of Texas, a case in which Mugg & Dryden was plaintiff and your petitioner was defendant.

The declaration of the plaintiff in said cause was a petition for the recovery of damages by reason of making a quotation to plaintiffs for the shipment of coal from Coal Hill, Arkansas to Weatherford, Texas, of $1.25 and $1.50 per ton respectively, it being alleged that the defendant assessed and collected from plaintiffs freight at the rate of $2.75 and $2.85 per ton, respectively, which said freight plaintiff was forced to pay in order to obtain the coal, the damages by reason whereof being in the sum of $140.18.

Upon the trial of said case in said county court your petitioner demurred both generally and specially to plaintiff's said declaration upon the following questions, to-wit:

I.

That if such quotation of rate was made, that it was void and inoperative on account of the fact that the rate so alleged to have been quoted was a lower rate than the Interstate Commerce Commission rate in effect between Coal Hill, Arkansas, and Weatherford, Texas.

II.

That said quotation of rate was not a contract that could be enforced either in law or in equity.

III.

Because it appears from plaintiff's declaration that the shipments in controversy were between points in different States,—therefore Interstate shipments, and no other rate could be charged and collected than that rate filed with the Interstate Commerce Commission covering coal in carload lots from Coal Hill, Arkansas, and Weatherford, Texas, printed and publicly posted in defendant's station, and in effect at the time these shipments were made, which said rate was collected.

IV.

Because the suit was in effect a suit for overcharge, plaintiff's contention in effect being that by defendant's collecting the Interstate Commerce rate legally in effect between said points, plaintiffs were damaged in the sum claimed.

V.

Because the defendant was compelled to charge and collect the Interstate Commerce rate between the two points, irrespective of any quotation of a lower rate; which was done.

Upon a trial of the cause raising the above issues, judgment was rendered for plaintiff against your petitioner; whereupon your petitioner regularly appealed said cause to the court of civil appeals for the second supreme judicial district of Texas, that being the highest court of law or equity of the said State in which a decision could be had in said cause, assigning therein as error the action of the trial court in not sustaining your petitioner's contentions that it was compelled to charge and collect the Interstate Commerce rate upon delivery of the freight mentioned and the other defenses hereinbefore set out.

The errors assigned in such appellate court raised the questions hereinbefore set out, and your petitioner shows that each of said questions raised and presented a Federal question in said
24 cause, viz:

I.

That the court erred in rendering judgment for the plaintiff in this cause, because the undisputed evidence shows that the rate alleged to have been quoted by your petitioner's agent was a lower rate than the rate filed with the Interstate Commerce Commission covering coal in carload lots from Coal Hill, Arkansas, to Weatherford, Texas, and printed and publicly posted in your petitioner's stations, and in effect at the time the shipment was made. Wherefore, such contract or quotation of rate was in violation of the law, and void, and inoperative, and that by reason thereof plaintiff could not recover.

II.

That the court erred in rendering judgment herein for the plaintiff, because the undisputed evidence showed that the plaintiff's cause of action was based upon a quotation of a rate alleged to be a contract of shipment lower than the rate in effect on shipments of coal in carload lots from Coal Hill, Arkansas, to Weatherford, Texas, filed with the Interstate Commerce Commission and printed and publicly posted in accordance with the law; which said contract or quotation of rate was illegal and void, and no recovery could be had for a breach thereof.

III.

Where a rate lower than the Interstate Commerce Commission rate is agreed upon for a shipment from a point in one State to a point in another, but the regular interstate commerce rate was demanded and collected at the destination of said shipment, such agreement or contract is illegal, and the excess above the agreed rate can not be recovered by the shipper, though he did not know that his contract was illegal.

IV.

Whether if a contract to be fulfilled and carried out contemplates a violation of the Interstate Commerce Commission acts, such
25 contract is unlawful and unenforceable by the courts.

At the October term 1904, of the court of civil appeals for

he second supreme judicial district of Texas, the complaint made by aid appeal of your petitioner and its accompanying record, came on o be heard and was submitted in said court of civil appeals for the econd supreme judicial district of Texas, and on the 19th day of November, A. D. 1904, such court certified the question therein aised to the supreme court of the State of Texas, which said ques-ions were answered by said supreme court of the State of Texas on December 15th, 1904; and upon January 7th, A. D. 1905, the court f civil appeals for the second supreme judicial district of Texas upon he answers of the supreme court upon the questions certified to it in his case, rendered its final judgment thereon, affirming the judg-ment of the court below, viz: the county court of Tarrant county, Texas.

Petitioner further shows that the said judgment of the said court of civil appeals for the second supreme judicial district of the State of Texas was and is a final judgment in the highest court in the State of Texas in which a decision in said suit could or can be had.

Petitioner further shows that a Federal question was made in said case, to-wit: as hereinbefore set out, and that the said judgment of he said court of civil appeals for the second supreme judicial district of Texas was repugnant to and in conflict with the laws of the United States and the interstate commerce acts of its Congress, aforesaid, and specially section 2 of "An act to regulate commerce," approved February 4th 1887, and section 1 of "An act to further regulate com-merce of foreign nations and among the States," approved February 19th 1903; and that said judgment of said court of civil appeals for the second supreme judicial district of Texas was contrary
26 thereto; that petitioner claimed a title, right, privilege and community under and by virtue of said acts, aforesaid, and there was drawn into the question the construction and application of said acts, and the decision of the court of civil appeals for the sec-ond supreme judicial district of Texas was against the said title, right, privilege and community claimed thereunder; and that a decision of said Federal question was necessary to the judgment rendered.

Wherefore, your petitioner presents herewith an exemplified tran-script of the record of the court of civil appeals for the second su-preme judicial district of Texas, together with the answer of the supreme court to the questions certified to it by said court of civil appeals for the second supreme judicial district of Texas in said cause, and prays that a writ of error to said court of civil appeals for the second supreme judicial district of Texas be allowed; that cita-tion be granted and signed; that the bond herewith presented be ap-proved, and that upon a compliance with the terms of the statute in such cases made and provided, said bond and writ of error may oper-ate — a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment afore-

said, of the court of civil appeals for the second supreme judicial district of Texas be reversed.

TEXAS & PACIFIC RAILWAY COMPANY,
By T. J. FREEMAN,
M. A. SPOONTS,
GEO. THOMPSON,
Attorneys and of Counsel for Petitioner.

The writ of error, as prayed for in the foregoing petition, is hereby allowed this the 24th day of March, 1905; the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of one thousand dollars, dated at Fort Worth, Texas, this 24th day of March, A. D. 1905.

27 T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Filed in the court of civil appeal for second supreme judicial district of Texas, Mar. 24, 1905.

W. C. STRONG, *Clerk.*

Order Allowing Writ of Error.

In the Court of Civil Appeals for Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RY. CO., Plaintiff in Error,
vs.
MUGG & DRYDEN, Defendant in Error.

Order Allowing Writ of Error.

The above entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States *of* the court of civil appeals for the second supreme judicial district of Texas, and upon examination of the said petition and the record in said matter, and desiring to give the petitioner an opportunity to present — the Supreme Court of the United States the questions presented by the record in said matter, it is ordered that a writ of error be, and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by the said petitioner be, and the same is hereby approved.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Filed in court of civil appeals for second supreme judicial district of Texas, March 24, 1905.

28 *Writ of Error to U. S. Sup. Court.*

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RY. CO., Plaintiff in Error,
vs.
MUGG & DRYDEN, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the court of civil appeals for the second supreme judicial district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals for the second supreme judicial district of Texas, before you, or some of you, being the highest court of law or equity of the State in which a decision could be had in the said suit between Mugg & Dryden, a partnership composed of J. A. Mugg and J. A. Dryden, and The Texas & Pacific Railway Company, a corporation, wherein was drawn into question the construction of a clause of a statute of the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under the clause of said statute, *and* manifest error hath happened to the great damage of the said Texas & Pacific Railway Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 23rd day of April, 1905, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should
29 be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 24 day of March, in the year of our Lord, 1905.

J. H. FINKS,
[SEAL.] *Clerk United States Court for the Northern District of Texas,*
By J. B. FINKS, *Deputy.*

Allowed by
T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Filed in court of civil appeals for second supreme judicial district of Texas, March 24, 1905.

W. C. STRONG, *Clerk.*

Citation in Error.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RY CO., Plaintiff in Error,
vs.
MUGG & DRYDEN, Defendant in Error.

Citation in Error.

United States of America to Mugg & Dryden, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the second supreme judicial district of Texas, wherein The Texas & Pacific Railway Company, a corporation, is plaintiff in error, and you are defendants in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be *created*, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. H. Conner, chief justice of the court of civil appeals for the second supreme judicial district of Texas, this the 24th day of March, in the year of our Lord, one thousand, nine hundred and five.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Copy of the within citation served this the 24th day of March, 1905, at the office of Mugg & Dryden in the city of Fort Worth in the State of Texas.

MUGG & DRYDEN,
Def'ts in Error.

Filed in the court of civil appeals for second supreme judicial district of Texas, March 24, 1905.

W. C. STRONG, *Clerk.*

Bond in *Writ of Error.*

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RY. CO., Plaintiff in Error,
vs.
MUGG & DRYDEN, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents that we, The Texas & Pacific Railway Company, a corporation, as principal, and Edw. O. Tenison and C. R. Buddy, as sureties, are held and firmly bound unto Mugg & Dryden, a partnership composed of J. A. Mugg and J. A. Dryden, in the sum of one thousand and no/100 ($1000.00) dollars, to be paid to the said obligees, their successors, representatives and assigns, to the payment of which well and truly to be made, we bond ourselves, our heirs, executors and administrators jointly and severally by these presents, yet upon these conditions, that

Whereas, the above named plaintiff in error, The Texas & Pacific Railway Company hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the court of civil appeals for the second supreme judicial district of Texas.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error, The Texas & Pacific Railway Company shall prosecute its said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise of full force and effect.

Witness our hands and seal- this the 6th day of March, A. D. 1905.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By T. J. FREEMAN,
M. A. SPOONTS,
GEO. THOMPSON, *Att'ys.*
EDW. O. TENISON.
C. R. BUDDY.

I hereby approve the foregoing bond and sureties, this the 24th day of March, A. D. 1905.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

I, Geo. W. Blair, clerk of the court of civil appeals in and for the fifth supreme judicial district of Texas do hereby certify that
32 Ed. O. Tenison and C. R. Buddy are citizens of Dallas county and have property over and above all liabilities largely in excess of the amount of the foregoing bond and I would not hesitate to approve same if presented to me for approval.

Given under my hand and seal of office at Dallas Texas, this 17th day of March, A. D. 1905.

[SEAL.] GEO. W. BLAIR, *Clerk.*

THE STATE OF TEXAS,
County of Dallas.

I, Edw. O. Tenison, do solemnly swear that I am worth in my own right at least the sum of one thousand ($1000.00) dollars, after taking from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of my debts of every description whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Dallas county in the State of Texas and have property in said State, liable to execution, worth more than one thousand ($1000.00) dollars.

EDW. O. TENISON, *Surety.*

Sworn to and subscribed before me this the 17th day of March, 1905.

[SEAL.] W. H. COPE,
Notary Public, Dallas County, Texas.

THE STATE OF TEXAS,
County of Dallas.

I, C. R. Buddy, do solemnly swear that I am worth in my own right at least the sum of one thousand ($1000.00) dollars, after taking from my property all that which is exempt by the constitution and laws of the State from forced sale, and after the payment of my debts of every description, whether individual or security debts, and after satisfying all incumbrances on my property which are known to me; that I reside in Dallas county in the State of Texas and have property in said State, liable to execution, worth more than
33 one thousand ($1000.00) dollars.

C. R. BUDDY, *Surety.*

Sworn to and subscribed before me this the 17 day of March, 1905.

[SEAL.] W. H. COPE,
Notary Public, Dallas County, Texas.

Filed in the court of civil appeals for second supreme judicial district of Texas, March 24, 1905.

W. C. STRONG, *Clerk.*

Assignments of Error.

In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
MUGG & DRYDEN, Defendant in Error.

Now comes the plaintiff in error, the said Texas & Pacific Railway Company, and respectfully submits that in the record proceedings, decision, and final judgment of the court of civil appeals, for the second supreme judicial district of Texas, for the State of Texas, in the above entitled matter there is manifest error in this, to wit:—

I.

The court erred in holding "that the railroad company is liable to appellees for damages occasioned by the misrepresentation of the rate of freight, as shown by the statement of facts. The authority of the agent who stated the rate to appellees is not questioned. The fact that the agent named a less rate than that which was in effect at the time, and which was posted according to the inter-state commerce law would not avoid the claim of the appellees for damages arising out of the misrepresentation of the appellant's station agent.
34 It is true that if the agent had made a contract with the appellees for the shipment of the coal from Coal Hill, Arkansas, to Weatherford, Texas, and at the rates stated by him, that contract could not have been enforced, because it would have been in violation of the inter-state commerce law. But this suit was not brought upon such contract for its enforcement. There was no contract. It is a question for damages occasioned to appellees by the misrepresentation of the agent of the railroad company whereby the appellees were caused to make a contract for the sale of coal at a certain price, relying upon representation by appellant's agent that the freight would be as stated. Whereas the appellees were compelled to pay a higher rate; and thus the damages arising to appellees were occasioned by a misunderstanding which induced them to make the investment in the coal and to contract for its sale."

II.

That the said judgment of said court is repugnant and in conflict with the laws of the United States, and especially those several acts of the Congress of the United States commonly known as "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereto, especially section 2 of said act approved February 4, 1887.

III.

That the judgment of said court is repugnant to and in conflict with the laws of the United States, and especially that act commonly known as "The Elkins' bill," Pub. 103, approved February 19, 1903, entitled "An act to further regulate commerce with foreign nations and among the States," and especially section 1 of said act.

IV.

The court erred in rendering judgment against plaintiff in error in this cause, because the undisputed evidence shows that the rate alleged to have been quoted to defendant in error by plain-
35 tiff in error's agent was a lower rate than the rate filed with the Inter-state Commerce Commission covering coal in carload lots from Coal Hill, Arkansas, to Weatherford, Texas, and printed and publicly posted in plaintiff in error's stations and in effect at the time the shipments were made. Wherefore, such contract or quotation was in violation of the law and void, and that by reason thereof the defendant in error could not recover herein.

V.

The court erred in rendering judgment herein against plaintiff in error because defendant in error's cause of action is based on a quotation of a rate alleged to be a contract of shipment lower than the rate quoted in carload lots from Coal Hill, Arkansas, to Weatherford, Texas, filed with the Interstate Commerce Commission, and printed and publicly posted, which said contract or quotation of the rate was illegal and void and inoperative and no recovery could be had for a breach thereof.

VI.

The court erred in rendering judgment against plaintiff in error, because said judgment is repugnant to, and in conflict with, is contrary to and in violation of and in contravention of the said statutes of the United States with reference to the regulation of inter-state commerce and the provisions therein contained.

VII.

The court erred in rendering any judgment herein against plaintiff in error, because there was drawn into question the construction and application of a statute of the United States under which plaintiff in error claimed a right, title, privilege and immunity, and the decision of the court was against the right, title, privilege and immunity thus set up and claimed by plaintiff in error.

36 VIII.

The court erred in holding that the said inter-state commerce acts had no application herein.

IX.

The interpretation placed on the interstate commerce acts by the court of civil appeals for the second supreme judicial district of Texas, is contrary to, in violation of, and in contravention of the said statute of the United States as to the regulation of inter-state commerce.

T. J. FREEMAN,
GEORGE THOMPSON,
M. A. SPOONTS,
Att'ys for Plaintiff in Error.

Filed in court of civil appeals for second supreme judicial district of Texas March 24, 1905.

37 In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RY. CO., Plaintiff in Error,
vs.
MUGG & DRYDEN, Defendant in Error.

Citation in Error.

United States of America to Mugg & Dryden, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals for the second supreme judicial district of Texas, wherein the Texas & Pacific Railway Company, a corporation, is plaintiff in error, and you are defendants in error, and show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable T. H. Conner, chief justice of the court of civil appeals for the second supreme judicial district of Texas, this the 24th day of March, in the year of our Lord, one thousand, nine hundred and five.

T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

Filed in court of civil appeals for second supreme judicial district of Texas, Mar. 24 1905.

W. C. STRONG, *Clerk.*

Copy of the within citation served this 24th day of March 1905, at the office of Mugg & Dryden in the city of Fort Worth in the State of Texas.

MUGG & DRYDEN,
Deft in Error.

38 In the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

TEXAS & PACIFIC RY. CO., Plaintiff in Error,
vs.
MUGG & DRYDEN, Defendant in Error.

Writ of Error.

THE UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the court of civil appeals for the second supreme judicial district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals for the second supreme judicial district of Texas, before you, or some of you, being the highest court of law or equity of the State in which a decision could be had in the said suit between Mugg & Dryden, a partnership composed of J. A. Mugg and J. A. Dryden, and the Texas & Pacific Railway Company, a corporation, wherein was drawn into question the construction of a clause of a statute of the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under the clause of said statute, and manifest error hath happened to the great damage of the said Texas & Pacific Railway Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 23rd day of April, 1905, in
39 the said Supreme Court, to be then and there held, that, the record and proceeding aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 24th day of March, in the year of our Lord, 1905.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Ft. Worth.]

J. H. FINKS,
Clerk, United States Circuit Court for the Northern District of Texas.
By J. B. FINKS, *Deputy.*

Allowed by—
T. H. CONNER,
Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas.

It is hereby certified that a copy of this writ is this day lodged in the clerk's office for the use of the defendant in error.

W. C. STRONG, *Clerk.*

Filed in court of civil appeals for second supreme judicial district of Texas, Mar. 24 1905.

W. C. STRONG, *Clerk.*

40 *Bill of Costs in Court of Civil Appeals.*

Bill of Costs, Court of Civil Appeals.

Filing record	.50
Docketing cause	.50
Appearances	1.00
Filing and entering motion	.35
Orders	2.00
Filing papers	2.10
Entering judgment	1.00
Taxing costs	.50
Mandate	1.50
Certified copy bill of costs	.70
Certified copies of motion for rehearing	2.50
Issuing notices	4.50
Issuing precepts	2.00
Sheriff's fees	2.00
Express charges	1.85
Transcript to U. S. Supreme Court	15.20
	$38.20
Costs in supreme court of Texas	12.70
Costs in county court of Tarrant county	25.20
Total	$76.10

I, W. C. Strong, clerk of the court of civil appeals in and for the second supreme judicial district of Texas, do hereby certify that the above and foregoing bill of costs is true and correct.

Witness my hand and the seal of said court at Fort Worth, Texas, this the 6th day of April, 1905.

[Seal Court of Civil Appeals of the State of Texas.]

W. C. STRONG, *Clerk.*

41 I, W. C. Strong, clerk of the court of civil appeals in and for the second supreme judicial district of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignments of error and all proceedings had in cause 4556, wherein The Texas & Pacific Railway Company is appellant and Mugg & Dryden are appellees, except that the original writ of error and the original citation in error are also included therein as well as copies thereof, as fully as the same remain on file and of record in my office.

Witness my hand and the seal of the said court of civil appeals for the second supreme judicial district of Texas, at my office in the city of Fort Worth, in Tarrant county, Texas, this the 6th day of April, A. D. 1905.

[Seal Court of Civil Appeals of the State of Texas.]

W. C. STRONG, *Clerk.*

42 [Endorsed:] No. 4556. Texas & Pacific Railway Company, plaintiff in error, *vs.* Mugg & Dryden, defendants in error. Transcript from the court of civil appeals, second supreme judicial district, of Texas at Ft. Worth, Texas.

Endorsed on cover: File No. 19,717. Texas court of civil appeals, 2d supreme judicial district. Term No. 233. The Texas & Pacific Railway Company, plaintiff in error, *vs.* Mugg & Dryden, a partnership composed of J. A. Mugg and J. A. Dryden Filed April 19th, 1905. File No. 19,717.

Supreme Court of the United States.

OCTOBER TERM, 1905.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MUGG & DRYDEN.

No. 233.

WRIT OF ERROR FROM COURT OF CIVIL APPEALS, SECOND SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This suit was instituted by appellees, Mugg & Dryden, in a Justice's Court from which it was appealed to the County Court of Tarrant County, Texas, in November, 1903, upon the following stated cause of action :

By reason of defendant making a quotation to plaintiffs a rate of $1.25 per ton on two cars of coal and $1.50 per ton on one car of coal, in January and February, 1903, respectively, from Coal Hill, Arkansas, to Weatherford, Texas, on which rates so made and quoted, *to* plaintiffs were relied on in contracting said coal shipped and sold at prices based on said rates ; whereas defendant assessed and collected of plaintiffs freight at the rate of $2.75 per ton on said two cars and $2.85 per ton on said one car, which said freight rate plaintiff was forced to pay and did pay under protest in order to

obtain said coal and deliver same in compliance with sales previously made. Plaintiffs' loss and damage in the sum aforesaid were occasioned by defendant's negligence in making and quoting to plaintiffs the said rates, on which rate quoted defendant knew plaintiffs relied and based their sales of the said three cars of coal shipped and sold thereafter, and then forcing plaintiff to pay a greater rate, amounting in the aggregate of the sum of $140.18 on said three cars of coal, thereby causing plaintiffs' loss and damage in the said sum (Tr., pp. 1, 2).

Appellant answered by general demurrer and general denial, and especially that if such a contract was entered into, or if such quotation of rate was made, it was void and inoperative, being a lower rate than the Interstate Commerce Commission rate, legally in effect between Coal Hill, Arkansas, and Weatherford, Texas, and that the amount so collected at destination by defendant was the said Interstate Commerce Commission rate in effect at said time, which they were compelled to collect; and that while plaintiffs allege their action was one for damages, on account of the negligence of defendant, it was, in effect, and in fact, a suit for overcharge, and nothing more. The case was tried without a jury, on December 28th, 1903, resulting in a judgment for plaintiffs in the sum of $140.18, the amount claimed by them (Tr., p. 2). A motion for a new trial was made and filed within the required time, and duly overruled. Notice of appeal was given, appeal bond file t January 21, 1904 (Tr., p. 8). A statement of facts was filed within the required time and the case regularly appealed to the Court of Civil Appeals.

The Court of Civil Appeals at Fort Worth certified the questions which are involved in this suit to the Supreme Court of Texas and said Court answered said certified questions and referred same back to Court of Civil Appeals at Fort Worth, which Court rendered judgment herein affirming the judgment of the Court below. From this judgment, the Texas and Pacific Railway Co. has sued out perfected its writ of error to this Court; the said Court of Civil Appeals being the highest court to which the case could be taken.

Assignments of Error.

I.

The court erred in holding "that the railroad company is liable to appellees for damages occasioned by the misrepresentation of the rate of freight, as shown by the statement of facts. The authority of the agent who stated the rate to appellees is not questioned. The fact that the agent named a less rate than that which was in effect at the time, and which was posted according to the inter-state commerce law would not avoid the claim of the appellees for damages arising out of the misrepresentation of the appellant's station agent. It is true that if the agent had made a contract with the appellees for the shipment of the coal from Coal Hill, Arkansas, to Weatherford, Texas, and at the rates stated by him, that contract could not have been enforced, because it would have been in violation of the inter-state commerce law. But this suit was not brought upon such contract for its enforcement. There was no contract. It is a question for damages occasioned to appellees by the misrepresentation of the agent of the railroad company whereby the appellees were caused to make a contract for the sale of coal at a certain price, relying upon representation by appellant's agent that the freight would be as stated. Whereas the appellees were compelled to pay a higher rate; and thus the damages arising to appellees were occasioned by a misunderstanding which induced them to make the investment in the coal and to contract for its sale."

II.

That the said judgment of said court is repugnant and in conflict with the laws of the United States, and especially those several acts of the Congress of the United States commonly known as "An act to regulate commerce," approved February 4, 1887, and the acts amendatory thereto, especially section 2 of said act approved February 4, 1887.

III.

That the judgment of said Court is repugnant to and in conflict with the laws of the United States, and especially that act com-

monly known as "The Elkins' bill," Pub. 103, approved February 19, 1903, entitled "An act to further regulate commerce with foreign nations and among the States," and especially Section 1 of said act.

IV.

The Court erred in rendering judgment against plaintiff in error in this cause, because the undisputed evidence shows that the rate alleged to have been quoted to defendant in error by plaintiff in error's agent was a lower rate than the rate filed with the Interstate Commerce Commission covering coal in carload lots from Coal Hill, Arkansas, to Weatherford, Texas, and printed and publicly posted in plaintiff in error's stations and in effect at the time the shipments were made. Wherefore, such contract or quotation was in violation of the law and void, and that by reason thereof the defendant in error could not recover herein.

V.

The Court erred in rendering judgment herein against plaintiff in error because defendant in error's cause of action is based on a quotation of a rate alleged to be a contract of shipment lower than the rate quoted in carload lots from Coal Hill, Arkansas, to Weatherford, Texas, filed with the Interstate Commerce Commission, and printed and publicly posted, which said contract or quotation of the rate was illegal and void and inoperative and no recovery could be had for a breach thereof.

VI.

The Court erred in rendering judgment against plaintiff in error, because said judgment is repugnant to, and in conflict with, is contrary to and in violation of and in contravention of the said statutes of the United States with reference to the regulation of inter-state commerce and the provisions therein contained.

VII.

The Court erred in rendering any judgment herein against plaintiff in error, because there was drawn into question the construction

and application of a statute of the United States under which plaintiff in error claimed a right, title, privilege and immunity, and the decision of the court was against the right, title, privilege and immunity thus set up and claimed by plaintiff in error.

VIII.

The court erred in holding that the said inter-state commerce acts had no application herein.

IX.

The interpretation placed on the interstate commerce acts by the Court of Civil Appeals for the Second Supreme Judicial District of Texas, is contrary to, in violation of, and in contravention of the said statute of the United States as to the regulation of inter-state commerce.

All of these assignments relate to the same subject and will be considered together.

BRIEF.

The Federal question raised in this case was specially set up and claimed by the Texas and Pacific Railway Company in the Court below, and fully appears in the record. See Answer of the Railroad Company (Tr., p. 2), setting up its alleged rights under the Inter-State Commerce Act. The Court of Civil Appeals of the Second Supreme Judicial District certified the questions in the case to the Supreme Court of Texas (Tr., pp. 12 and 13). The questions thus certified to the Supreme Court of Texas present the Federal question which the plaintiff in error makes in this case, and these Federal questions were decided by the Supreme Court of Texas against the defense of the Texas and Pacific Railway Company under the Inter-State Commerce Law, as appears in the record (Tr., pp. 12-14). The answer of the Supreme Court was certified to the Court of Civil Appeals, which Court, pursuant to the direction and judgment of the Supreme Court, rendered a judgment against the Texas

and Pacific Railway Company, in accordance with the opinion of the Supreme Court of Texas in this case.

The judgment of the said Civil Court of Appeals of Texas was, and is, the final judgment of the highest Court of the State in which a decision of this case can be had. The said judgment of the Court of Civil Appeals is repugnant to, and in conflict with, the laws of the United States and the Inter-State Commerce Act of Congress, and especially with Section 2 of "An Act to regulate commerce," approved February 4, 1887, and Section 1 of a further "Act to regulate commerce of foreign nations among the States," approved February 8, 1893, and the said judgment of the said Court of Civil Appeals was contrary thereto. The plaintiff in error claimed the title, right and immunity under and by virtue of the said Acts, and there was drawn into question the construction and application of the said Acts, and the decision of the Court of Civil Appeals was against the right, title, privilege and immunity claimed thereunder, and the decision of said Federal question was necessary to the judgment rendered in this case. The facts, therefore, are undisputed; the Federal question which we submit now to the decision of the Federal Court is that said decision and judgment are erroneous.

There is only one question involved in this case and that is whether or not an action will lie against the Railway Company for the difference between the legal rate, printed, published and posted in accordance with the provisions of the Interstate Commerce Act, and a lower rate quoted by an agent to a shipper, and who ships under the lower rate so quoted.

We submit the following propositions as the law governing the decision of this question:

FIRST.

Where a rate lower than the Interstate Commerce Commission rate is agreed on for a shipment from a point in one State to a point in another State, but the regular rate was demanded and collected at the des-

tination of said shipment, such agreement or contract is illegal, and the excess above the agreed rate cannot be recovered by the shipper, though he did not know his contract was illegal.

SECOND.

Where a contract is made which is forbidden by law, or which is contrary to the public policy, no recovery can be had by violation of a breach of said contract, although the parties were ignorant that it was in contravention of law, and whatever tends to obstruct duty by defeating the letter and spirit of the law is also unlawful.

THIRD.

Inasmuch as the contract on which this suit was founded was in violation of the law, and therefore void, no cause of action for a breach of violation thereof can arise.

FOURTH.

The Court will not permit a party to an action to do indirectly what he cannot do directly, and the allegations of plaintiff that this action was one for negligence, or for negligently inducing plaintiffs to enter into a contract, or for a breach of said con-

tract, cannot change the fact that it is nothing more or less than a suit to recover an overcharge in freight rates.

FIFTH.

If an illegal contract is entered into, while such contract may not be inoperative, the Courts will not act when called upon to enforce such contract or agreement, but will leave the parties thereto in statu quo and refuse such parties recognition in the courts, and the same principle of public policy which leads the Courts to refuse to act when called upon to enforce such contracts will prevent the Court from acting to relieve either party from the consequences of the illegal transaction.

SIXTH.

A mere quotation of a rate is not a contract for shipment for which an action lies when a greater rate is charged and collected for the transportation of freight.

SEVENTH.

By the terms of the Interstate Commerce Act and the Elkins Bill Pub. No. 103, second session, 57th Congress, it is illegal for either a corporation or

person to give or receive any rebate, concession or discrimination, declaring same to be unlawful and the person or corporation so doing to be guilty of a misdemeanor.

EIGHTH.

Where a contract to be fulfilled and carried out contemplates a violation of the law, such contract is unlawful and cannot be enforced by the courts.

NINTH.

The testimony fails to show any contract of shipment for the breach of which an action can be maintained, and the Court should have rendered judgment for the defendant.

TENTH.

The testimony shows that the alleged contract of shipment was in violation of law, and the Court should have rendered judgment for the defendant herein.

The Act of Congress entitled, "An act to regulate commerce," approved February 4th, 1887, 1 Supp. Rev. Stat., p. 529, and amendments thereto, including the "Elkins" Bill 32 U. S. Stat., Chap. 708, p. 847, provides that said act "shall apply

for a continuous carriage or shipment from one State * * * to any other State or territory in the United States," and further provides that a greater or less rate than that filed with the Interstate Commerce Commission, and printed and publicly posted, is unlawful, and provides a penalty for making a greater or less charge than said rate.

It was agreed between counsel for plaintiffs and defendants, before announcing ready for trial, that the rate charged and collected on the shipments of coal in controversy, from Coal Hill, Arkansas, to Weatherford, Texas, viz: $2.75 per ton on each of the two cars, and $2.85 per ton on the third car, was the regular rate in effect at the time the shipments were made, as shown by the printed and published schedules of the Texas and Pacific Railway Company, on file with the Interstate Commerce Commission, and posted in the stations of the Texas and Pacific Railway Company as required by the Interstate Commerce Act (Tr., p. 8).

The rule we invoke as decisive of this case was necessarily approved by this honorable Court in Gulf, Colorado & S. F. Ry. Co. vs. Hefly, 158 U. S., 99. The question before the Court was whether a statute of the State of Texas requiring, under penalty, railroad companies, their officers, agents and servants to deliver freight to the consignee upon payment of the freight charges due *as shown by the bill of lading*, was enforcible as against the provisions of the Interstate Commerce Act. The Court held that "the State statute must, therefore, give way," and reversed the judgment below. Logically following this decision, a Circuit Court in Kinnavey vs. Terminal Association, 81 Fed. Rep., 801–803, by ADAMS, J., said:

"The rates so published and on file are the only legal rates the carrier can charge, and any variation from them subjects the carrier to the penalties of the Act," citing the Hefly case.

This action was instituted against the Texas and Pacific Railway Company by Mugg & Dryden to recover damages, or to be more exact and leaving out the consideration of unnecessary and useless allegations, to recover an alleged overcharge of $140.18. The agent of the Texas and Pacific Railway Company had quoted to Mugg & Dryden a lower rate than the regularly published inter-state tariff, and when the freight was received at the delivering point, the agent at that point before making a delivery of the freight corrected the freight rate and charged the shippers, Mugg & Dryden, the legally published inter-state tariff, which was greater by $140.18 than the

rate quoted by another agent of the Texas and Pacific Railway Company, and this suit is instituted to recover this difference or this overcharge. There is no question in this case that the shipment was an inter-state shipment, same being a shipment from Coal Hill, Arkansas, to Weatherford, Texas. There is no question that a regularly published inter-state tariff was in effect on this commodity at the time it was shipped. There is no question that the rate quoted by Mr. Clements, the agent of the Texas and Pacific Railway Company, to the shipper was a lower rate than the published inter-state rate. There is no controversy to the fact that the agent at Weatherford collected from the shipper the regularly published inter-state rate, which was paid under protest by the shipper, and that this suit is instituted by the shipper to recover the difference between the legal rate and the illegal rate which was quoted by the agent of the Texas and Pacific. The question is, can such a suit be maintained? In the case of the S. A. & A. P. R. R. vs. Clements (20 Tex. Civ. App., 498); s. c., 49 S. W., 913, the courts say the

"shipment being an inter-state shipment, was governed by the tariff rates fixed by the Inter-state Commerce Commission, and appellants' agent had the right, and it was his duty, to demand and receive from appellees the amount of freight so fixed, and the Court erred in rendering judgment against appellant for the $10.46 received in excess of the amount of freight agreed upon between appellee and the St. Louis and San Francisco Ry. Co"

Regardless of this decision, however, the facts in this case clearly show that the shipment was an inter-state shipment, and that the rate governing same was published, filed and posted, and that the rate charged was the duly published, filed and posted rate. Under this statement, we submit that no cause of action will lie against the railway company for having collected its legally published and lawful tariff. The two decisions upon which the Supreme Court of Texas based its opinion in this case are the cases of Pond-Decker Lumber Co. vs. Spencer, 86 Fed. Rep., 846, and Missouri Pacific Railway Co. vs. Crowell Lumber Co., 50 Neb., 293; s. c., 70 N. W., 964. We respectfully submit that in both of the above cases there were other questions of fact entering into same that may have influenced the Courts in their conclusion in those cases. In the first of the cases the Court states and acts upon the conclusion that no provision of the Interstate Commerce Act had been violated. In

the second of the cases above quoted, the Court also assumed that the contract sued upon did not violate any of the provisions of the Interstate Commerce Act.

Several decisions of the Court of Civil Appeals of Texas sustain our contention, viz.:

Mo. Kan. & Tex. Ry. vs. Trinity Lumber Co., 1 Tex. Civ. Appeals, 553; s. c. 21, S. W. 290.

Tex. & Pac. Ry. vs. Clark, 4 Tex. Civ. App., 611; s. c. 23, S. W. 698.

Mo. Kan. & Tex. Ry. vs. Stoner, 5 Tex. Civ. App., 50; s. c. 23, S. W. 1020.

Dillingham, Receiver, vs. Fischel, 1 Tex. Civ. App., 546; s. c. 21, S. W. 554.

S. A. A. P. Ry. vs. Clements, 20 Tex. Civ. App., 498; s. c. 49 S. W. 913.

See also

So. Ry. vs. Harrison, 119 Ala., 539; s. c. 13, A. & E. R. R. Cases, new series, 270.

At the time the two decisions referred to were handed down, what is known as the "Elkins Amendment," had not been enacted, and the Court may have assumed under the facts in the case, it not affirmatively appearing to the contrary, that no provision of the Interstate Commerce Law was being violated, but in the case at bar, there is no question that if a recovery is allowed in this case that it means a gross violation of the Interstate Commerce Act, and especially of the amendment known as the Elkins Amendment to the said act. Section 10 of the Interstate Commerce Act, taken in connection with the Elkins Amendment, in express terms prohibits the charging of a rate on interstate shipments lower than the legally published tariffs on file with the Interstate Commerce Commission and posted in accordance with law, as this tariff was filed and posted. Said act provides, in express terms, when parties, either the railway company or the shipper are guilty of charging or receiving a lesser rate than that published as follows:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, *or participates in any rates so filed or published*, that rate as against such carrier, its officers or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any other departure therefrom, shall be deemed to be an offense under this section of this Act."

The said "Elkins Amendment" of the Interstate Commerce Act kes it a specific offense, punishable by a heavy fine to charge receive a lower rate than that filed and published in accordance h the Interstate Commerce Act. The purpose of filing, publish- and posting the Interstate rate was *for the purpose of advising shipper or the public* as to what the legal rate was, for the rea- that it is an offense made so by the act, for the shipper to be a ty to an arrangement by which he gets a lower rate than the olished rate. His ignorance of the law is no excuse of justifica- for his being allowed to receive a lower rate than the legal rate; t some agent may have quoted him a lower rate than the legal e does not place him upon any higher ground than he was before, he has no right to benefit by the illegal act of a railway agent more than he would have the right to receive a benefit from his illegal act. In this case, he has done nothing more than the requires that he should do—namely, pay the lawful and legal e upon his shipment, and having paid same, he cannot maintain action to recover it back, and that is what he assumes to do in case. The fact that he paid the legal rate under protest would authorize him to institute a suit for its recovery. In the case ve in the 86 of Fed. Rep., 846, the learned Judge, in his reason- states that it would be contrary to public policy not to permit uit to be instituted for a breach of contract such as is sued upon hat case. We submit, in all due respects to the reasoning of the rned Judge, that it would be contrary to public policy to authorize h a cause of action as this to be maintained, for the reasons: First, t there is a law making it a crime to charge a lower rate than a lly published tariff; that every provision has been made to give his law publicity and so inform the public of its terms and its alties. That in the ordinary course of the business of transpor- on agents are likely to quote the shippers a lower rate than the l rate; shippers should be conclusively presumed to know that rates quoted them are subject to correction—namely, subject to hange to the legally published tariff, and they have no right to tract upon any basis other than the basis of the legally published ff. If a railway company is obliged to protect an illegal rate ted by an agent, then the laws against rebating and discrimina- are dead letters, for the reason that the question of what rate shipper shall have in the movement of his interstate freight is a stion of fact between the shipper and the agent, the published ffs having no weight and no bearing upon the question.

We submit that it was not the intention of the Interstate Commerce Act and the Elkins amendment thereto to take away from the shipper all responsibility and to place no burden upon him in the matter of knowing what the regularly published and posted tariffs were; on the contrary, it is evidently the intention of said acts to place as much responsibility upon the shipper as upon the railway company in the matter of carrying out the lawful tariffs on interstate commerce. The amount involved in this suit is very small in the matter of dollars and cents, but the principle involved, as was said in the case of Railway vs. Hefly, "is one of no little importance." In this case, the railway company has followed the law; has charged and collected the legal rate; the shipper has paid the legal rate. Under the law, *he was in a position to have advised himself as to what the legal rate was before he made his contract;* the law requires the railway company to furnish this advice and furnish it in a form accessible to the shipper. This advice had been furnished to the shipper in the form required by the law itself and he cannot excuse his ignorance of the legal rate by putting the blame upon an agent of the railway company, and we respectfully submit that no recovery should have been had in this case; that public policy demands a decision to the effect that the published interstate rates are conclusively presumed to be known to the shipper, and that no shipper, either under an express contract or under a misquoted rate by a freight agent, shall have the right to move his freight upon a lower rate than the legal rate; that on all interstate shipments, under all conditions, the shipper is conclusively presumed to know that it moves under the legal rate, such rate he must pay, regardless of any conditions they may have entered into his making the shipment. This we submit is not only good public policy, but is also the letter of the law.

We submit that the judgment should be reversed and the cause remanded, with instructions to enter judgment for the Texas and Pacific Railway Company.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
THOMAS J. FREEMAN,
Counsel for The Texas and Pacific Railway Company.

Supreme Court of the United States.

No. 233.—October Term, 1905.

The Texas and Pacific Railway Company, Plaintiff in Error, *vs.* Mugg and Dryden, a Partnership composed of J. A. Mugg and J. A. Dryden.	In error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

[May 14, 1906.]

The railroad company, plaintiff in error in this record, appealed to the Court of Civil Appeals of the Second Supreme Judicial District of the State of Texas from a judgment which had been rendered in favor of Mugg and Dryden, defendants in error herein. The appellate court certified to the Supreme Court of Texas the question of the liability of the railroad company, upon a statement of facts which correctly set forth the controversy, and which was as follows:

". . . The cause originated in the justice court, from which it was appealed to the county court of Tarrant County, where a trial was had on the following statement of appellees' cause of action, to wit: 'Statement of plaintiffs' cause of action. Damages in the sum of $140.18 as follows: By reason of defendant making and quoting to plaintiffs a rate of $1.25 per ton on two cars of coal and $1.50 per ton on one car of coal, in January and February, 1903, respectively, from Coal Hill, Ark., to Weatherford, Texas, on which rates so made and quoted to plaintiff relied in contracting said coal shipped and sold at prices based on said rates; whereas defendant assessed and collected of plaintiff freight at the rate of $2.75 per ton on said two cars, and $2.85 per ton on said one car, which said freight rate plaintiff was forced to pay and did pay under protest in order to obtain said coal and deliver the same in compliance with sales previously made. That plaintiffs' loss and damage in the sum aforesaid were occasioned by defendant's negligence in making and quoting to plaintiff the said rates, on which rate quoted defendant knew plaintiff relied and based their sales of the said three cars of coal shipped and sold thereafter and then forcing plaintiffs to pay a greater rate, amounting in the aggregate to the sum of $140.18, on said three cars of coal, thereby causing plaintiffs loss and damage in the said sum.'

"To this pleading the appellant answered by general demurrer and general denial, and especially denied that it ever entered into any contract for the shipment of coal for appellees from Coal Hill, Ark., to Weatherford, Texas, at the rate alleged in appellees' statement; and further that if it ever quoted any such rate to appellees such quotation was a violation of the Interstate Commerce Act and was a lower rate than the interstate rate in effect at the time shipment was made, which had been duly

published, printed, and posted in its depot and stations as required by the terms of the act; and further, that it collected from appellees the exact rate prescribed for such commodity under such act, and that such contract, if any was made, was in violation of law and void. Upon a trial without a jury judgment was rendered for the appellees for the amount sued for and all costs of suit.

"It is agreed by the parties that the rate charged and collected on the shipments of coal in controversy from Coal Hill, Ark., to Weatherford, Texas, as shown in appellees' statement of cause of action, was the regular rate in effect at the time the shipments were made, as shown by the printed and published schedules of the Texas and Pacific Railway Company on file with the Interstate Commerce Commission, and posted in the stations of said railway company, as required by the Interstate Commerce Act. There is no assignment challenging the sufficiency of the evidence to support the material allegations of appellees' pleadings."

The Supreme Court of Texas having answered that the railroad company was liable "for damages occasioned by the misrepresention of the rate of freight as shown by the statement of facts," (98 Tex. ,) the Court of Civil Appeals affirmed the judgment against the railroad company. Thereupon this writ of error was prosecuted.

Mr. Justice WHITE delivered the opinion of the Court.

This case is within the principle of and is ruled by the decision in *Railroad Co.* v. *Hefley*, (158 U. S. 98.) Upon the authority of that case the Supreme Court of Alabama denied the liability of a railroad company in a case of similar character to that under review. (*Southern Ry. Co.* v. *Harrison*, 119 Ala. 539.) The opinion of Chief Justice Brickell, so aptly reviewed and declared the effect of the decision in the Hefley case that we adopt the same in disposing of the present controversy. The Alabama court said:

"In *Railroad Co.* v. *Hefley*, (158 U. S. 98,) the plaintiff sued to recover damages for the refusal by the carrier to deliver goods consigned to him, after tender of payment of the stipulated charges named in the bill of lading. The goods (a lot of furniture) had been received by the carrier at St. Louis, Mo., for transportation to Cameron, Tex., at a stipulated rate, specified in the bill of lading, of 69 cents per 100 pounds, the charges amounting to $82.80, whereas the published schedule rate in force at the time was 84 cents, and the charges should have been $100.80; and the plaintiff, as in this case, was ignorant of the fact that the rate obtained was less than the schedule rate. It was held, in an opinion by Brewer, J., that the plaintiff was not entitled to recover. It is true that the only question discussed in the opinion was whether or not the interstate act superseded the Texas statute, which prohibited a common carrier from charging or collecting from the owner or consignee of freight a greater sum than that specified in the bill of lading, and this question was decided in the affirmative . . . But this was not the only effect of the decision, and it is by its effect on the rights of the parties to such a contract, by whatever process of reasoning the decision may be reached, that the

State courts are bound. The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one State to another at a rate, specified in the bill of lading, less than the published schedule rates filed with and approved by the Interstate Commerce Commission, and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods, or damages for their detention, upon the tender of payment of the amount of charges named in the bill of lading, or of any sum less than the schedule charges; in other words, that, whatever may be the rate agreed upon, the carrier's lien on the goods is, by force of the act of Congress, for the amount fixed by the published schedule of rates and charges, and this lien can be discharged, and the consignee can become entitled to the goods, only by the payment, or tender of payment, of such amount. Such is now the supreme law, and by it this and the courts of all other States are bound, . . . "

The judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.